

DOCUMENT RESUME

G2719 - [A1882940]

[Allegedly Improper Restrictive Nature of Invitation for Bids].
B-189146. July 1, 1977. 3 pp. + enclosure (1 pp.).

Decision re: Kinetic Systems, Inc.; by Robert F. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services:
Definition of Performance Requirements in Relation to Need
of the Procuring Agency (1902).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: General Government: Other General Government
(806).

Organization Concerned: Department of the Army: Redstone
Arsenal, AL.

Authority: 4 C.F.R. 20.2. B-187790 (1977). B-186303 (1976). 52
Comp. Gen. 821. 52 Comp. Gen. 20.

The protester alleged that the invitation for bids
improperly restricted items for use in the performance of a
contract. The protest, filed after bid opening, was untimely and
was not considered on its merits. There was no basis for
objecting to the supplying by a large business a particular item
for use in the contract to the prime contractor under a total
small business set-aside contract. (Author/SC)

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Jerold Cohen
Proc. 1

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-189146

DATE: July 1, 1977

MATTER OF: Kinetic Systems, Inc.

DIGEST:

1. Since protest to contracting agency that IFB improperly restricted items for use in performance of contract to those of particular manufacturer was filed after bid opening, subsequent protest to GAO is untimely and will not be considered.
2. There is no basis to object to large business supplying to prime contractor under total small business set-aside particular item for use in contract performance, since there is no evidence that contractual end item will not be manufactured or produced by small business, and IFB advised bidders that such large business was only acceptable source of item.

Kinetic Systems, Inc. (KSI), protests the allegedly improper restrictive nature of invitation for bids (IFB) No. DAAH03-77-B-0012, issued by the U.S. Army Missile Materiel Readiness Command, Redstone Arsenal, Alabama, for the construction of a laser radar measurement facility (LSMFT). KSI, a manufacturer of vibration isolation mounts, contends that the solicitation's designation of Barry-Wright (Barry) vibration isolation mounts as the only acceptable items for use by the prime contractor in the LSMFT was inappropriate, since KSI's product is allegedly technically equivalent.

KSI states that on December 2, 1976, it became aware of a projected requirement for an LSMFT, and began attempts to illustrate to the requiring activity the equivalency of its vibration isolation mounts to the Barry item. KSI further states that it learned by April 13, 1977, that a solicitation designating the Barry product as the only acceptable vibration isolation mount had been issued, and that bids were to be opened on April 15. KSI alleges that it immediately telephoned the buyer to express its objection to the restriction, and received the following response:

"* * * [The buyer] stated it was virtually impossible to delay the bid date to alter the sole source item to 'or equal' in the technical specification. The procurement had already experienced several delays and was behind schedule. The specifications were under the control of Dr. John Stettler and had been prepared on a University of Arizona design contract. Ms. Steward [the buyer] suggested the way to

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proceed was to complete the present bid procedure and identify the lowest responsive bidder. KSI could then sell the low bidder on its equivalence to the Barry specified product, with final approval by Dr. Stettler. * * *

On the basis of the buyer's advice, KSI contacted the low bidder after bid opening concerning the acceptability of KSI's product. The low bidder allegedly responded that "if he received his contract before * * * [KSI's] equivalence was formally acknowledged, he would have no alternative except to comply with the sole source Barry specification." KSI states that it felt constrained to protest at that point, and filed a protest with the contracting officer on April 22. The protest was denied by letter dated May 12. The protest to our Office was filed on May 23.

Section 20.2 of our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures), provides in pertinent part:

"(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 [working] days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section * * *.

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *."

The restrictive nature of the solicitation was apparent to KSI by its own admission by April 13. Thus, under section 20.2(b)(1) of our Procedures, in order for the protest to our Office to be considered, the initial protest to the contracting agency had to be filed by April 15, when bids were opened. As stated above, the protest was not filed with the Air Force until April 22. Accordingly, the matter will not be considered on its merits. See Products Engineering Corporation; Lutz Superdyne, Inc., B-187790, March 8, 1977, 77-1 CPD 170.

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Furthermore, even if we view KSI's April 13 telephone call to the buyer, in which KSI expressed its objection to the solicitation's requirements, as a "protest," the opening of bids on April 15 without taking the requested corrective action must be considered "adverse agency action" within the meaning of section 20.2(a) of our Procedures. See Square Deal Trucking Company, Inc., B-182436, February 19, 1975, 75-1 CPD 103 at 2; 52 Comp. Gen. 821 (1973). Accordingly, the protest to our Office, filed more than 10 working days thereafter, cannot be considered on that basis either. Concerning the effect on this alternative consideration of KSI's April 22 written protest to the Air Force, while we realize that a protester may consider an agency's initial adverse action to be ill-founded or inadequately explained, leading the protester to seek reconsideration or clarification at another level, it is nevertheless obligatory that the protest to the General Accounting Office be filed after notification of initial adverse agency action. Mr. Scrub Car Wash Systems, Inc., B-186586, July 9, 1976, 76-2 PD 29; 52 Comp. Gen. 20 (1972). In this connection, since our Procedures are published in the Federal Register (40 Fed. Reg. 17979 (1975)), KSI is considered to have been on constructive notice of their contents, including the time limits set for filing protests. Mr. Scrub Car Wash Systems, Inc., *supra*.

By letter dated June 6, KSI stated it had just learned of another basis to protest. KSI questions the propriety of the use of Barry, allegedly a large business, as a supplier in a procurement set aside totally for small business. However, since there is no evidence that the contractual end item will not be manufactured or produced by a small business, and since all bidders were advised in the IFB of the requirement for Barry vibration isolation mounts, we see no basis to object to Barry's participation. See J & H Smith Mfg. Co., Inc., B-185303, July 14, 1976, 76-2 CPD 45. Accordingly, the protest on this issue is denied.

Deputy

R. F. Kellan
Comptroller General
of the United States



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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

IN REPLY
REFER TO: B-189146

July 1, 1977

The Honorable Robert F. Drinan
Member, United States House of Representatives
42 Weston Street
Waltham, Massachusetts 02154

Dear Mr. Drinan:

We refer to your letter dated June 17, 1977, expressing interest in a bid protest filed in our Office by Kinetic Systems, Inc., concerning solicitation No. DAAF.03-77-B-0012 issued by the United States Army Missile Materiel Readiness Command, Redstone Arsenal, Alabama.

Enclosed is a copy of our decision of today denying the protest. The enclosure to your letter is returned as requested.

Sincerely yours,


Deputy Comptroller General
of the United States

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